

NO. 85-755

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

DELYNDA ANN RICKER BARKER REED, APPELLANT

V.

PRINCESS ANN RICKER CAMPBELL, INDIVIDUALLY,
AND AS ADMINISTRATRIX OF THE ESTATE OF
PRINCE RUPERT RICKER, DECEASED, APPELLEE

ON APPEAL FROM THE COURT OF APPEALS FOR THE
EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANT'S BRIEF ON THE MERITS

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DELYNDA ANN RICKER BARKER REED

APPEAL DOCKETED OCTOBER 15, 1985
PROBABLE JURISDICTION NOTED DECEMBER 9, 1985

QUESTIONS PRESENTED

RETROACTIVITY QUESTIONS:

1. Should Delynda be denied the benefit of the holding of this Court in Trimble v. Gordon under the "time of filing" test applied by the state court below?

2. Should Delynda benefit from the holding of this Court in Trimble v. Gordon under the test of Chevron v. Huson?

3. Should the retroactivity of Trimble be determined by whether the claim was filed in an open estate or as a collateral attack on a closed estate?

(ii)

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4. Where maternal heirship requires only a preponderance of the evidence while paternal heirship is not allowed, is the distinction permissible?

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LEGITIMATION QUESTION:

6. Does the Fourteenth Amendment require an opportunity for Delynda to legitimate herself equivalent to the statutory procedures arbitrarily denied her?

LIST OF PARTIES

The Appellant is Delynda Ann Ricker Barker Reed. The Appellee, individually and as administratrix of the estate, is Princess Ann Ricker Campbell Ham. In addition, the following Appellees were also Appellees in the state action:

1. Rosemary Jane Ricker Farrell,
2. Prince Ricker, Jr.,
3. Brett Drayton Ricker, and
4. Mark Ricker

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OPINIONS AND JUDGMENTS BELOW

The published opinion and denial of rehearing by the Court of Appeals, Eighth Supreme Judicial District of Texas (reprinted in appendix A of the Jurisdictional Statement, pp. A.1 - A.14) is reported as: Reed v. Campbell, 682 S.W.2d 697 (Tex.App.--El Paso 1984, writ ref'd n.r.e.).

Notation of the Texas Supreme Court's refusal of application for writ of error, with the notation "no reversible error", (reprinted in Appendix A of the Jurisdictional Statement, pp. A.20 - A.21) is published in the advance sheets, 691 S.W.2d, No.2, p.8.

The following orders are unreported: order of the state district court denying Delynda heirship (reprinted in appendix A of the Jurisdictional Statement, pp. A.15-A.19); order of the Court of Appeals overruling Delynda's motion and amended motion for rehearing (reprinted in appendix A of the Jurisdictional Statement, pp. A.26 - A.27); and order of the Texas Supreme Court of July 17, 1985, overruling Delynda's amended motion for rehearing (reprinted in appendix A of the Jurisdictional Statement, pp. A.22 - A.23.

JURISDICTIONAL GROUNDS

This Court has jurisdiction of this appeal under 28 U.S.C. §1257(2).

The judgment of the Texas Supreme Court overruling Appellant's amended motion for rehearing was entered on July 17, 1985. Notice of appeal to this Court was mailed to the clerk of the Court of Appeals on September 27, 1985, and filed on September 30, 1985. This appeal was docketed in the Supreme Court of the United States on October 15, 1985, as No. 85-755. Probable Jurisdiction was noted by this Court on December 9, 1985.

CONSTITUTION AND STATUTES

1. The enacting legislation of Chapter 13 of the Family Code provides: "This act takes effect September 1, 1975." cited as: TEX. FAM. CODE, Ch. 476, §58, 1975 TEX. GEN. & SPEC. LAWS, 1273.

2. §13.21 of the Voluntary Legitimation Subsection, Subsection B of the Family Code provides:

Section 13.21. Voluntary Legitimation

(a) If a statement of paternity has been executed by the The father of an illegitimate child, the father or mother of the child or the Texas Department of Human Services may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

cited as: TEX. FAM. CODE ANN. §13.21(a)

(Vernon 1986, pamph.)

Appendix B of the Jurisdictional
Statement sets forth:

3. The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, reprinted at J.S. App. B.1;

4. TEX. PROB. CODE. §37 (Vernon, 1980), reprinted at J.S. App. B.1 - B.2;

5. The 1956 §42 of the Texas Probate Code, as originally enacted and made effective January 1, 1956; cited as: TEX. PROB. CODE Ch. 55, §42, 1955 TEX. GEN. & SPEC. LAWS 88, 102, amended by Act of May 28, 1977, ch. 290, § 1, 1977 TEX. GEN & SPEC. LAWS, 762, 762-63, reprinted at J.S. App. B.2.

6. The 1977 version of §42 of the Probate Code, effective May 28, 1977; cited as: TEX. PROB. CODE, Ch. 290, §1, 1977 TEX. GEN. & SPEC. LAWS, 762, 762-63,

amended by Act of March 22, 1979, Ch. 24,
§ 25, 1979 TEX. GEN. & SPEC. LAWS 35, 40;
reprinted at J.S. App. B.3 - B.4.

7. The 1979 version of §42 of the
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cited as: TEX. PROB. CODE §42 (Vernon
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8. TEX. FAM. CODE, Ch. 476, §24, 1975
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9. TEX. FAM. CODE, Ch. 674, §2, 1981
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10. TEX. FAM. CODE ANN. §13.01 (Vernon
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11. TEX. FAM. CODE ANN. §13.02 (Vernon
Supp. 1975-1985).

STATEMENT OF THE CASE

Delynda appeals from a judgment denying her heirship from her father based on her illegitimacy (J.S. App. A.15).

The jury found that there was a father-daughter relationship between Delynda and her father, who was named Prince Rupert Ricker (J.A. 63, Issue 1). Delynda's parents married eleven months before her birth (J.A. 63, 64, Issue 2). Delynda's parents agreed at that time to be husband and wife (J.A. 64 Issue 3).¹

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1. The jury finding of paternity, and of the invalid marriage ceremony and agreement, were not challenged by an evidence point in the court of appeals, and are therefore conclusively established. Lovejoy v. Lillie, 569 S.W.2d 501, 504-505 (Tex. App. -- Tyler 1978, writ ref'd n.r.e.). (continued)

Delynda was adjudged illegitimate because her parents' marriage was invalid, since her father was already married

1. (continued)

There was ample evidence besides Prince Ricker's invalid marriage to her mother which supported the jury's finding that he is Delynda's father. Delynda's mother had intercourse only with Prince Ricker from their wedding until Delynda was born (S.F. 889). Delynda's mother lived with Prince Ricker as husband and wife after their wedding (S.F. 40). The couple kept two households, near their respective jobs, in neighboring towns (S.F. 120, 72) and did not spend every night together (S.F. 27, 72). Prince Ricker in 1960 admitted to his then-fiance Marilyn Watts that he had been living with Delynda's mother when she became pregnant with Delynda (S.F. 610). While pregnant with Delynda, Delynda's mother told Prince Ricker's mother that he was the father (S.F. 649). Near his death, Prince Ricker told his sister and her husband: "Annabel [Delynda's mother] and I were living together. There was no one else" (S.F. 450). On this occasion, Prince Ricker identified Delynda to his sister and her husband as the child born out of wedlock of whom he had written in his

(continued on next page)

to another woman, and was not divorced until eight months before Delynda was born (J.A., divorce decree cited 41-43).²

1. (continued)

A.A. work. In his sister's words, he "called her by name . . . Delynda, and said he never did anything for her and that he was sorry . . . about it" (S.F. 449).

In the opinion of Prince Ricker's sister, Delynda is "a perfect cross between her mother and Prince" (S.F. 430). A family resemblance is evident in comparing pictures such as P.E. 2 (O&A: S.F. 31); P.E. 8-12 (O&A: S.F. 439); P.E. 13 (O&A: S.F. 641); and P.E. 17 (O&A: S.F. 864). Prince Ricker identified Delynda as his child to various acquaintances throughout his life, including his driver, Armando Martel, whose advice he sought regarding Delynda's adoption by Jerry Barker (E.g., S.F. 146).

2. Although the children of marriages "null in law" were made legitimate by the 1956 §42 of the Probate Code, the Texas courts each overruled sub silentio Delynda's points of error urging that she was entitled to heirship by virtue of her parents' bigamous marriage.

Delynda's father died intestate on December 22, 1976 (J.A. 6), four months before this Court handed down its opinion in Trimble v. Gordon, 430 U.S. 672, on April 26, 1977. His estate has since remained in open administration.

Delynda filed a claim for child support from her father's estate on February 16, 1978, (J.A. 13), less than ten months after Trimble. Delynda filed an Application for Heirship on June 15, 1978 (J.A. 15), less than eighteen months after her father died.

Her application was filed before the publication of notice on November 9, 1978 to persons having claims against her father's estate (J.A. 21).

After being assured by Prince Ricker's father, an attorney, that she was divorced from Prince Ricker, Delynda's

mother married again, to Jerry Barker, in February of 1959 (S.F. 93). Jerry Barker adopted Delynda on October 21, 1965 (P.E. 6, O&A: S.F. 211). Prince Ricker was given notice of Delynda's adoption. He showed his driver, Martel, the adoption papers and asked his advice concerning the adoption. Prince Ricker approved of Jerry Barker, and reached a decision in favor of the adoption: "I believe he's a good man, so I believe I'm gonna do it" (S.F. 147).

Before she was adopted, Delynda had no right of paternal child support because Gomez v. Perez, 409 U.S. 535 (1973), had not yet been decided. After her adoption, she still had no right to paternal support since Gomez did not give adopted children a right of support against their natural fathers.

The Texas legislature, responding to Gomez v. Perez, enacted a procedure whereby a father could voluntarily take on a duty to support his nonmarital children. Prince Ricker did not make use of this procedure with respect to Delynda.

In 1975 the Texas legislature responded to cases recognizing support rights under Gomez by enacting statutory procedures for securing legitimation and support. Delynda was denied the benefit of the statutory action because she was born before its effective date.

The statute applied by the lower court to deny heirship to Delynda was the Texas Probate Code as enacted in 1956. The 1956 §42 allowed paternal heirship only if the parents had married. Since her parents' marriage had been declared invalid, Delynda was also deprived of the benefit of this statute.

After Delynda's father died, Trimble v. Gordon struck down an Illinois statute identical to §42, and §42 was twice amended. The 1977 amendment granted heirship to children whose fathers had legitimated them voluntarily under the 1973 Family Code. The 1979 amendment additionally granted heirship to illegitimates who prevailed in a suit under the 1975 Family Code. But since the enacting legislation did not make the amendments retroactive where the decedent had died before their effective dates, Delynda was denied any benefit of the amendments, as her father died before they were enacted.

There is no evidence that Delynda knew the marriage of her natural parents had been invalid until she brought this action (e.g., S.F. 888, 879-882).

The central ruling of the appeals court was that Trimble v. Gordon would not be applied retroactively where the father died before Trimble and the suit for heirship was filed afterwards.

Second, the lower court held that, even if Delynda could claim under the amendments, her exclusion by their substantive terms would not deny equal protection because a "rational state basis" supported the exclusion. The lower court did not address Delynda's claim that the Texas probate statutes discriminate against mothers who face the intestate death of the fathers of their illegitimate children. I did not address the invidiousness of the Family Code's effective-date exclusion based on her birth date nor her exclusion from the Family Code procedure for purely voluntary legitimation by the father. And it did not address whether

Delynda should have had any heirship rights by virtue of the 1977 and 1979 amendments to the Probate Code, which recognized rights of heirship only under the Family Code procedures.

The Texas Supreme Court refused to review the case on a writ of error, noting "no reversible error". Probable Jurisdiction was noted on December 9, 1985.

SUMMARY OF ARGUMENT

Delynda seeks relief under the Fourteenth Amendment from state statutory classifications under which she has been denied heirship from her father and statutory legitimation remedies. These illegitimacy classifications are repugnant to the Fourteenth Amendment because Delynda was afforded no reasonable opportunity to be legitimated, and the denial had

no substantial relationship to any permissible state purpose.

Probate Code §42 has posed an insuperable barrier to Delynda's heirship, while legitimate children, such as Appellee, were allowed full inheritance rights from their fathers. The 1956 §42 applied by the lower court to disinherit Delynda was indistinguishable from the Illinois statute struck down in Trimble v. Gordon, 430 U.S. 762 (1977). The lower court's sole rationale for sustaining this statute against the illegitimacy discrimination attack was that Trimble had not been applied retroactively where the father died before the case came down and suit was filed afterwards.

It was erroneous for the lower court to apply its "time of filing" test rather than the three-prong test of Chevron v. Huson, 404 U.S. 97 (1971). Under Chevron, Trimble applies

retroactively to open estates. First, it had become foreseeable before Trimble that insurmountable illegitimacy barriers in probate might be struck down. Second, Trimble's purpose is frustrated by the refusal to apply Trimble's ruling, because the estate of Delynda's father is still in open probate. Third, the equities favor retroactive application. Appellee can show no reliance on inconsistent prior law, nor on a final judgment.

The sexually discriminatory aspect of the classifications applied to defeat Delynda's heirship is a second and independent reason that they are repugnant to the Fourteenth Amendment. The bastardy classifications imposed on Delynda's heirship are subject to a gender-based subclassification. Surviving mothers of illegitimate children are disadvantaged by the continuing denial of paternal inheritance to an illegitimate child, while full

maternal inheritance rights have been allowed. This limitation on illegitimacy disinheritance gives a surviving father the benefit of the mother's estate when discharging his duty to support his non-marital child. Based solely on her sex, the statute continues to deny a surviving mother this benefit. The gender-based subclassification is not substantially related to state interests in order in probate, because it is under-inclusive in cases like the one at hand, where a child is able to convincingly show paternity.

The lower court gave no explanation for its rejection of Delynda's sex discrimination argument. Upon refusing to review the bastardy classification under even "insurmountable barrier" Equal Protection analysis, the lower court should have struck the statute on the basis of its invidious sex discrimination. Striking the sexual classification was

foreshadowed in Reed v. Reed. The statute upheld in Labine v. Vincent did not involve sexual classification. The sex discrimination issue was expressly reserved in Trimble.

The respective effective dates of their enacting legislation arbitrarily excluded Delynda from the benefits of a statutory paternity action under Chapter 13 of the Family Code and from heirship under the 1977 and 1979 amendments to §42 of the Probate Code. These effective dates were invalid under the Fourteenth Amendment.

Delynda's convincing proof of paternity in the present action should be viewed as satisfying the constitutional prerequisite to a Fourteenth Amendment remedy which is the equal of the statutory benefits of the Family and Probate Codes. It is repugnant to the Fourteenth Amendment that Delynda be

denied the statutory benefits accorded other children based either on these statutes' arbitrary effective dates or substantive terms. By virtue of the invidiousness of these statutory classifications, Delynda is entitled to a remedy in Equal Protection equal to the benefits which they deny her. Regarding the invidious probate provisions, Delynda's remedy is heirship. Regarding the Family Code, her Fourteenth Amendment remedies include full legitimation, heirship, and attorneys fees.

ARGUMENT

I.

THE ILLEGITIMACY CLASSIFICATION OF TEXAS PROBATE CODE §42, BY MAKING DELYNDAS STATUS OF BIRTH AN INSUPERABLE BAR TO HEIRSHIP FROM HER FATHER, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

A. THE 1956 PROBATE CODE §42, WHICH THE LOWER COURT APPLIED TO DENY DELYNDA HEIRSHIP, WAS INDISTINGUISHABLE FROM THE ILLINOIS STATUTE STRUCK DOWN IN TRIMBLE V. GORDON, 430 U.S. 672 (1977).

The 1956 enactment of Probate Code §42 makes subsequent marriage of the parents the exclusive condition for paternal inheritance by an illegitimate child. Because the marriage of her parents was declared invalid, Delynda's inheritance was absolutely barred by this 1956 statute.

The court below correctly recognized that the insuperable legitimacy barrier of the 1956 enactment is invalid in light of Trimble v. Gordon, 430 U.S. 762. The 1956 §42 is indistinguishable from the statute in Trimble. The Texas Supreme Court in Davis v. Jones, 626 S.W.2d 303, 305 (Tex. 1982) wrote that "Before 1977, an illegitimate child could inherit, under the Texas statute, only from the mother." As this Court said in Lalli v. Lalli, 439 U.S. 257 (1978), at 273:

The Illinois statute in Trimble was constitutionally unacceptable because it effected a total statutory disinheritance of children born out of wedlock who were not legitimated by the subsequent marriage of their parents.

Noting that Trimble required alternatives to marriage for establishing heirship from the father, Davis v. Jones went on to reach the obvious conclusion, 626 S.W.2d at 309: "[A]t the time of the death of his father in 1960, there were not 'suitable alternatives' under Trimble." Accord: Lovejoy v. Lillie, 569 S.W.2d 501, (Tex.Civ.App.--Tyler 1978 writ ref'd n.r.e.)

B. BECAUSE §40 AND §38 OF THE TEXAS PROBATE CODE WOULD GIVE DELYNDIA FULL INHERITANCE RIGHTS, THE LOWER COURT'S REFUSAL TO STRIKE DOWN THE UNCONSTITUTIONAL §42 WAS NECESSARY TO ITS JUDGMENT.

If §42 is set aside, two general provisions of the Probate Code control Delynda's heirship. The first of these, §40, provides that an adopted child shall

inherit "from and through its natural parent or parents" as well as from the adoptive parents. Probate Code §38 provides that the estate of a decedent shall descend to "his children and their descendants."

C. EVEN IF TRIMBLE V. GORDON WERE NOT APPLICABLE, IT WAS ERROR FOR THE LOWER COURT TO REFUSE TO STRIKE §42, BECAUSE THE STATUTE WAS UNCONSTITUTIONAL UNDER EQUAL PROTECTION PRECEDENTS WHICH THIS COURT HANDED DOWN BEFORE TRIMBLE.

In Solem v. Stumes, 104 S.Ct. 1338, (1984) this Court, upon finding the case in question not retroactive, remanded the appeal before it to the lower court for consideration under prior law.

In the case at hand, the lower court, having decided that Trimble did not apply, refused to apply any form of Equal Protection analysis to the 1956 §42 under prior law, even "insurmountable barrier" analysis:

[T]he equal protection argument fails as Trimble v. Gordon, . . . has not been applied retroactively where the father died before [Trimble] came down and suit was filed afterwards. Reed v. Campbell 682 S.W. 2d 700 (1984)

This holding does not account for the failure to apply illegitimacy cases which were handed down by this Court prior to Trimble. Under the Equal Protection analysis of these earlier cases, as well as in Trimble, §42 is invidious and void.

As set out more fully infra, these earlier cases unanimously struck down insurmountable barriers based merely on a status of illegitimate birth. The failure of the court below to apply the analysis of the earlier cases to the statute in this case was thus harmful error which, if Trimble were not applicable, was necessary to the result.

D. IT WAS ERROR FOR THE LOWER COURT TO USE A "TIME OF FILING" TEST INSTEAD OF THE NONRETROACTIVITY TEST OF CHEVRON V. HUSON.

1. THE LOWER COURT'S "TIME OF FILING" CLASSIFICATION IS UNCONSTITUTIONALLY OVER- AND UNDER-INCLUSIVE.

Under the "time of filing" test applied by the court below, claims are automatically allowed if filed before Trimble, and automatically dismissed if filed after.

As applied by the lower court, this test fails to distinguish between direct and collateral attack. If logically applied, claims brought before Trimble succeed against even closed estates. Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1976), judgment vacated 431 U.S. 911 (1977), on remand 560 S.W.2d 538 (1978) (briefed in appendix C of the Jurisdictional Statement, p. C.24). Conversely, applications for heirship

brought after Trimble, like Delynda's, are denied notwithstanding that the estate is still open and pending. Compton v. White, 266 Ark. 648, 587 S.W.2d 829 (Ark. 1979); Ford v. King, 268 Ark. 128, 594 S.W.2d 227 (Ark. 1980) (briefed in Appendix C of the Jurisdictional Statement, pp. C.27 - C.28).

The lower court's test is over-inclusive and jeopardizes the orderly settlement of estates. It is under-inclusive and arbitrarily denies Equal Protection.

Trimble requires that any state denials of heirship be necessary in order to preserve orderly probate. The over-and under-inclusive "time of filing" test fails to meet this requirement. The "time of filing" test actually jeopardizes orderly probate procedure and settlement of titles. Had the collateral attack in Winn v. Lackey, 618 S.W.2d 910 (Tex.Civ. App.--Eastland 1981, no writ), been

brought before Trimble, instead of after, the "time of filing" test would have automatically required reapportionment of the estate, notwithstanding that it had been closed. The "time of filing" test reached the correct result in Winn only because of the lucky chance that the collateral claim was filed after Trimble. In Winn, the land was under a contract for sale to third parties, the Lackeys. Clearly, the order provided by Probate Code §37 and §55 would have been disrupted by re-opening the estate for reapportionment under Trimble.

The denial of direct claims in open estates is, at the same time, under-inclusive. Delynda's claim was brought in her father's open estate, not by collateral attack. Thus none of the disruptiveness of the example above can be seen in her case. The estate was held in trust under §37 of the Probate Code. Under

Probate Code §55, no state interest in order or certainty had attached.

Reasonable reliance by third parties, such as the mineral lessees, is protected by these provisions, and by §188 of the Probate Code. Delynda's heirship could readily have been allowed, as it was claimed in the orderly process of probate itself.

The operation of the "time" test is also highly illogical: it denies Trimble claims because they are brought after Trimble. The explanation of this anomaly is that the "time" test is actually result-oriented, and based on an impermissible state interest in minimizing heirship under Trimble. The "time" test thus lacks the permissible state interest required by Trimble.

2. THE "TIME OF FILING" CLASSIFICATION DISCRIMINATES INVIDIOUSLY IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The "time of filing" test overlooks the legal and factual circumstances on which nonretroactivity of Trimble must rationally depend: 1) whether it was foreseeable that insurmountable legitimacy barriers might be struck down in probate; and 2) whether the estate was open or closed when the application for heirship was made.

This Court, exercising its authority to determine the retroactive effect of its own decisions, has fashioned a test which does take these considerations into account. Chevron v. Huson, 404 U.S. 97,

106-7 (1971), is the leading case setting forth this test:

In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see e.g., Hannover Shoe, Inc. v. United Shoe Machinery Corp., supra, 392 U.S., at 496, 88 S.Ct., at 2233, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see. e.g., Allen v. State Board of Elections, supra, 393 U.S., at 572, 89 S.Ct., at 835. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter v. Walker, supra, 381 U.S., at 629, 85 S.Ct., at 1738. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." Cipriano v. City of Houma, supra, 395 U.S., at 706, 89 S.Ct., at 1900.

Unlike the "time" test, the Chevron test is rational, and relevant to legitimate governmental interests. Because the Fourteenth Amendment requires that litigants similarly situated be not denied the same treatment, a sufficient demonstration of Chevron-type factors is required to justify denial of the benefit of a decision of this Court in a state Court forum.

As this Court observed in holding its Fourth Amendment decisions retroactive where cases are reviewed directly,

And Justice Harlan's reasoning -- that principled decisionmaking and fairness to similarly situated petitioners requires application of a new rule to all cases pending on direct review -- is applicable with equal force to the situation presently before us.

Shea v. Louisiana, 105 S.Ct. 1065, 1070 (1985).

Delynda is situated similarly to Deta Mona Trimble, and her case is before the Court on direct review, not collateral

attack. No distinction between their cases justifies the treatment Delynda has suffered under the "time of filing" test. The "time" test excluded Delynda conclusively from Equal Protection relief without any reasonable relationship to a permissible state interest, in violation of the Fourteenth Amendment.

3. THE "TIME OF FILING" TEST VIOLATES THE PRINCIPLE OF STARE DECISIS.

Chevron protects the decisions of this Court from the vitiation suffered by Trimble at the hands of the court below. Chevron was an exercise of the authority of this Court over the scope of its decisions, and should not be ignored. It follows that the Chevron factors must be convincingly demonstrated before a state court is able to disregard controlling Supreme Court precedent.

E. THE THREE CHEVRON REQUIREMENTS FOR NONRETROACTIVITY CANNOT BE MET IN THIS CASE.

Chevron's test would apply Trimble to this case. First, Trimble was not sufficiently novel to trigger the Chevron threshold. Second, Trimble's purpose pleads eloquently for retroactive application. Third, the equities strongly favor retroactivity, in this open estate.

1. THE CHEVRON THRESHOLD OF NOVELTY IS NOT SATISFIED BY TRIMBLE, BECAUSE ITS HOLDING WAS CLEARLY FORESHADOWED.

The first Chevron requirement--an avulsive change in the law--is a threshold requirement for nonretroactivity. United States v. Johnson, 457 U.S. 537 (1982), at 550, n. 12.

The Trimble decision established a new principle of law, but not by overruling precedent. It did not expressly overrule any prior decision. Nor did it do so

implicitly. No prior decision had upheld an insurmountable probate barrier, and every decision expressly considering an insurmountable barrier in other contexts had struck it down.

The issue decided in Trimble was one of first impression, having been expressly reserved in the earlier probate case of Labine v. Vincent, 401 U.S. 532, 540 (1971). Determination of the Chevron threshold issue therefore turns on whether Trimble's holding was clearly foreshadowed.

The issue addressed by the foreshadowing prong of Chevron's nonretroactivity test is whether a litigant's reliance on a contrary result would have been justified. If it was foreseeable that this Court might decide Trimble as it did, then there can be no reliance equity which would justify disregard of the Fourteenth Amendment and the Trimble decision.

This Court has said in the criminal context in United States v. Johnson, 457 U.S. 537, 551 (1982), that:

In general, the Court has not subsequently read a decision to work a "sharp break in the web of the law," unless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one." Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, or disapproves a practice that this Court arguably has sanctioned in prior cases, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.

In the civil context, the case of Hannover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), is cited by Chevron and is germane. There the Court ruled that its endorsement of a rule of antitrust law which had previously been

followed only by the Court of Appeals for the Second Circuit did not present a "new rule" for retroactivity purposes. The court noted that:

Whatever development in antitrust law was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years. These cases did not constitute a sharp break in the line of earlier authorities or an avulsive change which caused the current of the law thereafter to flow between new banks. We cannot say that prior to those cases potential antitrust defendants would have been justified in thinking that then current antitrust doctrines permitted them to do all acts conducive to the creation of monopoly, so long as they avoided direct exclusion of competitors or other predatory acts.

(footnotes omitted)

Trimble's holding was thrice clearly foreshadowed. First before Labine v. Vincent, second in the Labine opinion (and its dissent), and third after Labine, this Court made clear that an insurmountable

burden to intestate inheritance by illegitimate children might be struck down. This foreshadowing became increasingly clear in subsequent decisions of this Court, so that before Trimble it had become almost a question of when, rather than whether, the Court would strike down insurmountable barriers in probate.

BEFORE LABINE

Long before Labine, it was uncontroversial that the Fourteenth Amendment applied in the probate context. Pennsylvania v. Board of City Trusts of Philadelphia, 353 U.S. 230 (1957); Pennsylvania v. Brown, 392 F.2d 120 (3rd Cir. 1968). Indeed, it had been decided that even Congress could act in the probate area, notwithstanding a state's rights challenge. Trimble, 401 U.S. at 548, n. 16. This Court ruled, before Labine v. Vincent, 401 U.S. 532 (1971)

came down, that an illegitimate child is a "person" within the meaning of the Fourteenth Amendment. Levy v. Louisiana, 391 U.S. 68 (1968). It followed logically from these premises that illegitimate children could inherit in intestacy, notwithstanding contrary statutory classifications based on their condition of birth. Weber v. Anderson, 269 N.W.2d 892 (Minn. 1978).

THE LABINE MAJORITY

The Labine majority foreshadowed that an insurmountable illegitimacy classification might be struck down by taking pains to clarify that its ruling did not extend to such a barrier. The four-Justice dissent went further, unmistakably foreshadowing that such a burden would be struck down when presented.

The majority opinion in Labine, in sustaining the Louisiana statute, stressed the alternatives to marriage of the parents provided by that statute for heirship and support for the dependent illegitimate. Labine expressly clarified that its ruling did not extend to a classification which was insurmountable.

Labine wrote:

We emphasize that this is not a case, like Levy, where the State has created an insurmountable barrier to this illegitimate child.

Labine v. Vincent 401 U.S. at 539.

Moreover, the fact that Labine would be distinguished in cases involving insurmountable barriers became clear very early. As this Court pointed out in Trimble, 430 U.S. 762, 773 (1977):

In Weber our distinction of Labine was based in part on the fact that no such alternatives existed, as state law prevented the acknowledgment of the children involved.

The Labine majority raised no doubts that the Fourteenth Amendment would apply in future cases of racial discrimination in probate. The doubt that it did raise was whether intermediate scrutiny classifications -- illegitimacy and sex -- would be applied in probate and similar areas. Its thrust was expressly directed at these two areas, each of which touches on "the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property." 401 U.S. at 539. "To further strengthen and preserve family ties," said the court, "Louisiana regulates the disposition of property upon the death of a family man." Id.

Since the Labine majority expressly declined to rule whether an insurmountable barrier in probate would be struck down, it was not "clear past precedent" that such a burden would be sustained, as

required by the Chevron threshold. It was apparent that the Labine majority, if later confronted with a family-related barrier which was insurmountable, would be forced to choose between extending its "states rights" holding or applying the "insurmountable barrier" distinction which it emphasized so strongly in dicta.

THE LABINE DISSENT

Labine was decided over a strong four-Justice dissent. The dissent regarded the majority opinion as inconsistent with Levy, and an attempt to remove family-related classifications (i.e., sex and legitimacy) from the protection of the Fourteenth Amendment. To the extent that the dissent was correct, Labine can be credited with creating con-

fusion over the authority of Levy, not a clear rule within the meaning of Chevron.

And the fact that one additional vote would have made the dissent opinion the majority foreshadowed that even Labine's limited ruling sustaining the surmountable barrier before it might be subject to further analysis, to the extent that it conflicted with Levy.

THE EFFECT OF LABINE

After Labine, it was less clear than before that illegitimate children and women would continue to be regarded as "persons" within the meaning of the Fourteenth Amendment, at least in matters touching on family, property, and probate rights. But the issue of insurmountable barriers in probate had not been reached. The resolution of this issue in Trimble was "clearly foreshadowed" within the meaning of Chevron, since it had been

expressly reserved. Pending that resolution, reliance by litigants could not have been justified in an expectation that an insurmountable barrier would be upheld. Rather than reliance, a decision to act on an opinion about the outcome would have been risk-taking, because either resolution was possible.

While the Labine majority warned that insurmountable barriers might be struck down, the dissent foreshadowed that they would be. In light of the dissent, it appeared likely that, when the Court turned its attention to insurmountable probate barriers, there would be at least four votes for striking them down. A litigant who chose to take his chances in hopes that an insurmountable classification would escape Fourteenth Amendment scrutiny did so with fair warning that the issue might go the other way.

SUPREME COURT CASES AFTER LABINE

As intervening cases of this court removed much of the doubts thrown by Labine on Levy, the possibility grew ever more apparent that an insurmountable probate barrier, when considered by the Court, would indeed be set aside.

WEBER v. AETNA

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) adopted the reasoning of the Labine dissent and effectively removed any doubt which Labine might have cast on Levy's holding that an illegitimate child is a "person" under the Fourteenth Amendment.

Weber wrote the Labine's "insurmountable barrier" distinction into law. Finding that the burden in Weber was insurmountable, this Court struck it down. Read with Labine, this holding was one of the roots of the Equal Protection analysis

applied in Trimble: that the Illinois probate statute could not be sustained because it was insurmountable.

Rejecting Labine's language that state control of "family" matters was inviolate, Weber established that a state law attempting to penalize the innocent child was an illogical, unjust, and ineffectual way to enforce chastity. Weber thus began the second prong of the Equal Protection test applied in Trimble -- statutory classifications must be related to permissible state interests.

Weber held the claimant entitled to insurance payments upon a finding that she was the child of her deceased father. Weber thus demonstrated that the need to prove paternity after the father's death would not sustain an insurmountable state barrier.

REED v. REED

The doubt Labine cast on the application of intermediate scrutiny in probate was just as quickly laid to rest. Sex-based discrimination was struck down in the probate case of Reed v. Reed, 404 U.S. 71 (1971). Thus the invidiousness of the sexual discrimination of the Illinois and Texas statutes was squarely foreshadowed before Trimble.

GOMEZ v. PEREZ

In 1973, Gomez v. Perez, 409 U.S. 535 (1973), reiterated that insurmountable barriers would be struck down, and stressed that any problems of proof of paternity could not be made into an impenetrable barrier to shield otherwise invidious discrimination. Gomez also noted

that traditional Equal Protection scrutiny would be applied as well, and made it more explicit that the state could not deny illegitimate children the benefits accorded children generally.

MATHEWS v. LUCAS

In Mathews v. Lucas, 427 U.S. 495 (1976), this Court sustained the Social Security Act because it allowed illegitimate children to receive benefits by proving actual dependency. The Court noted, sua sponte, 427 U.S. at 515, n. 18:

Appellees do not suggest, and we are unwilling to assume, that discrimination against children in appellee's class in state intestacy laws is constitutionally prohibited, see Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971), in which case appellees would be made eligible for benefits under § 216(h)(2)(A).

The Court continued to develop and refine these principles through Trimble and beyond. Never since Levy has the

Court sustained an insurmountable barrier based on illegitimacy.

LOWER COURT CASES

It was not lost on lower courts or on commentators that Labine's majority left the Fourteenth Amendment treatment of "insurmountable" probate barriers¹ an open question. Honest debate and difference of opinion flourished.

Prior to Trimble v. Gordon, lower courts had struck down statutory barriers to intestate inheritance by illegitimate children. A Fourteenth Amendment right to

1. A long line of lower court cases consistently distinguished Labine on this basis when a statute posed an insurmountable barrier to the rights of illegitimates. E.g. Gentry v. U., 546 F.2d 343, 352 (Ct. Cl. 1976); Esakra v. Morton, 524 F.2d 9, 13, 15 (7th Cir. 1975); Davis v. Richardson, 342 F.Supp. 588, 592 (D. Conn. 1972), summarily aff'd 409 U.S. 1069 (1972).

heirship was recognized from the father¹ as well as the mother.²

On the strength of Weber, it was regarded as well-established in lower court cases before Trimble that any problems associated with proof of paternity after the father's death did not justify an insurmountable statutory bar based on illegitimacy in the context of compensation for loss of support upon the death of a father. Such statutory denials

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1. E.g., Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975); Will of Hoffman, 385 N.Y.S.2d 49 (N.Y. App. 1976); Green v. Woodard, 318 N.E.2d 397 (Ohio App. 1974).
 2. E.g., In re: Klingaman's Estate, 128 A.2d 311 (Del. 1957); In re: Estate of Jensen, 162 N.W.2d 861 (N.D. 1968).

had been struck down in federal¹ and state² courts.

The manifest illogic of treating heirship under Labine differently from support rights under Gomez was criticized in Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1976), judgment vacated 431 U.S. 911 (1977), on remand 560 S.W.2d 538 (1978).

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1. E.g., Davis v. Richardson, 342 F.Supp. 588 (D. Conn. 1972), summarily aff'd 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F.Supp. 1226 (D. Md. 1972), summarily aff'd 409 U.S. 1069 (1972); Gentry v. U.S., 546 F.2d 343 (Ct. Cl. 1976); Miller v. Laird, 349 F.Supp. 1034 (D.C. 1972); Williams v. Richardson, 347 F.Supp. 544 (W.D. N.C. 1972).
 2. E.g., Schmoll v. Creecy, 254 A.2d 525 (N.J. 1969); Yellow Cab Co. v. Industrial Comm'n, 247 N.E.2d 601 (Ill. 1969); In re: Estate of Johnson, 348 N.Y.S.2d 315 (Surr. Ct. 1973).

CONCLUSION: TRIMBLE WAS FORESHADOWED

Under Chevron, foreshadowing does not require that the result be foreordained. If it did, there would be no retroactive authority of any constitutional ruling of this Court which involved making a decision, rather than reaching a foregone conclusion.

It was plain before Trimble that the issue of insurmountable barriers in probate was ripe for resolution because it was expressly reserved in Labine. Moreover, the striking of an insurmountable barrier in Trimble was foreshadowed by the distinction in Labine itself. The subsequent cases of this Court uniformly distinguished Labine where the barrier was insuperable, applied intermediate Equal Protection scrutiny in probate, rejected any purported state interest in promoting chastity through punishing illegitimates, and found problems of posthumous proof of

paternity unpersuasive as a rationale for denying Equal Protection. Following the lead of this Court, state cases before and after Labine struck down insurmountable probate barriers under the Fourteenth Amendment.

Close reading of Trimble itself shows that it did not fashion new law, nor even distinguish Labine by a novel distinction. It is a scholarly opinion, rather than a landmark. After it was handed down, the stream of the law continued between the same banks as before. If a court were required to decide the case at hand viewing only the law up to the point of Trimble, there is no compelling reason to believe that it would not reach the same result. A different result would have been a retreat from Gomez, Weber, Mathews, and even Levy. Viewing all decisions of this Court except Trimble, the Trimble result would be required today if this

case came before the Court as one of first impression. Under these circumstances, no reliance on an opinion upholding insurmountable barriers in probate was justified. They had not been sustained in any other context touching on family life.

For a rational system of stare decisis, decisions of this Court should presumptively have retroactive effect. One exception should be permitted: where the prior law was clear, and the change unforeshadowed, so that a party was justified in reasonably relying on it. Only this kind of justified reliance can make retroactive application substantially inequitable, by causing the unjust hardship contemplated by Chevron. Only if the equities of justified reliance exceed the hardship caused by denying access to the new rule, and the purpose of the new rule itself, should retroactivity be abridged or denied.

2. RETROACTIVE APPLICATION WILL NOT IMPEDE TRIMBLE'S PURPOSE, BECAUSE THIS DIRECT APPEAL ARISES FROM AN APPLICATION IN OPEN PROBATE.

Trimble held invalid a classification based on illegitimacy because it cut more broadly than was required to serve the state interest of order in probate. The purpose of Trimble is thus one that speaks with unusual eloquence to the issue of retroactivity.

Trimble held the Illinois statute constitutionally flawed precisely because it excluded

at least some significant categories of illegitimate children of intestate men [whose] inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws.

Lalli v. Lalli, 439 U.S. 257, 266 (1978).

As observed by the Eighth Circuit in Gross v. Harris, 664 F.2d 667 (8th Cir. 1981):

It is self-evident that the purpose of the Trimble decision was to prevent constitutionally impermissible discrimination against illegitimates. Retrospective application of Trimble would further the Trimble purpose.

The decision of the lower court ill served the purpose of Trimble. Its "time of filing" test drew a retroactivity distinction which, if drawn by a statute, would be invalid under Trimble. The purpose of Trimble demands that equal access to the protection of its rule be limited only by a classification substantially related to the need for order in probate.

Denying Trimble retroactive effect will not further the interest of stability and order in probate. Delynda's initial claim was filed in open and pending probate. This appeal is an integral part of

the judicial probate process. Retroactive application of Trimble will result in the estate's simply being closed by a judgment vesting title in all six of Prince Ricker's children, rather than in only five of them. The judgment will enjoy the same protection from collateral attack if Delynda is declared as an heir as it would otherwise. The state interest of orderly probate recognized by Texas statutes in closed estates (e.g., Probate Code §§37 and 55) are not disturbed by retroactive application here. Probate Code §188 additionally protects persons, such as the mineral lessees, who have already dealt with the administratrix in good faith.

The lower court cases which have applied Chevron or a Chevron-type analysis have held that Trimble's purpose is served by retroactive application to cases filed in open probate. These cases have

recognized final judgment as the event upon which the state interest in orderly probate attaches. Succession of Trosclair, 423 So.2d 745 (La.App. 1982); Estate of Sharp, 163 N.J. Super. 148, 377 A.2d 730 (N.J. Chancery. 1977), affirmed as modified 394 A.2d 381 (N.J. App. 1978); Marshall v. Marshall, 670 S.W.2d 213 (Tenn. 1984).

Even where the lower courts have not expressly applied a Chevron analysis, their results are consistent with the distinction of open versus closed estates.¹

The purpose of Trimble would be hindered by denying the benefit of its ruling to Delynda, who brings this appeal from the denial of an application which she filed in the open probate of her father's estate.

1. Cases that did not expressly apply a Chevron analysis have nonetheless ruled

3. APPELLEE'S CLAIM TO RIGHTS PASSIVELY ACQUIRED UNDER AN UNCONSTITUTIONAL STATUTE DOES NOT RAISE EQUITIES SUFFICIENT TO DEFEAT DELYNDIA'S INTERESTS UNDER THE FOURTEENTH AMENDMENT.

The burden of persuasion on the equities is on the party seeking to oppose the retroactive application of a decision of this Court. In Jiminez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), the court on remand applied the Chevron test and held Jiminez v. Weinberger, 417 U.S. 628 (1974) to be retroactive. Because it was the Secretary who opposed retroactive

1. (cont'd)

Trimble retroactive when deciding an open estate, with only three exceptions, one being the case at hand. When the estate in question was closed, lower courts have held Trimble not to apply retroactively, with the sole exception of Pendleton v. Pendleton, 531 S.W.2d 507 (Ky. 1976), judgment vacated 431 U.S. 911 (1977), on remand 560 S.W.2d 538 (1978), in which the Kentucky court apparently thought that the result was forced by the remand from this court. See generally, Jurisdictional Statement, Appendix C.

application of Jiminez, the Seventh Circuit held that

[I]t is the Secretary who must convince us that a retroactive application of Jiminez would produce 'substantial inequitable results.' Thus, unless the balance of the equities clearly tips in the Secretary's favor, the general rule of retroactivity must be applied.

523 F.2d at 703.

The purpose of the Chevron rule is to protect those who have "acted in justifiable reliance upon a subsequently overruled judicial decision" so as to avoid "unfairness and undue hardship." Marshall v. Marshall, 670 S.W.2d 213, 215 (Tenn. 1984).

In Chevron the plaintiff delayed filing suit, in possible reliance on the superceded doctrine of laches. It was held unfair to apply a statute of limitations to him retroactively. Such reliance

by litigants is absent in the case at bar, and recognizing Delynda's rights in the estate is not an "inequitable result" within the meaning of Chevron.

Passively acquiring rights under an unconstitutional statute in open probate is not the type of reliance which overcomes the presumption of retroactivity for Trimble. Cf. Marshall, 670 S.W.2d 213, 215.

Because there was no reliance in fact, the equities regarding disposition of property are no different in this case than they would have been if Trimble were decided four months before Prince Ricker's death, instead of four months afterward. Nor do the equities in the case at bar differ from those weighed by this Court in

reaching the Trimble decision. In Trimble, this Court divested Sherman Gordon's collateral relatives of the entire estate they would have received under the Illinois statute, vesting it in his child, Deta Mona Trimble. In the absence of actual reliance, there is no reason to exclude Delynda from an equal share with her father's other children in this case.

Any action Appellee might have taken in reliance on the unconstitutional 1956 enactment was unjustified because Delynda's father's estate was still open when Delynda applied for heirship. Probate Code §§37 and 55 guard against reliance prior to a final judgment declaring that all heirs and creditors have been located. Section 37 provides that the administrator holds the state, pending final judgment,

"in trust to be disposed of in accordance with the law." Good faith reliance by third parties is protected by Probate Code §188. Reliance on a final judgment is protected by Probate Code §55. As a result, all heirs are given fair notice that additional heirs or creditors may bring claims at any time before the estate is closed.

Even before illegitimate children were declared "persons" within the meaning of the Fourteenth Amendment, expectations of heirship were subject to claims by unknown marital heirs. In fact, Delynda's position in the state courts was that she was legitimate, and only alternatively that if the statutes denied her legitimacy and heirship, they violated the Equal Protection guarantee. Further,

as discussed in connection with the Chevron novelty threshold, Trimble's holding was foreshadowed, so that reliance in a contrary result would not have been justified.

Sharing the estate with Delynda is not a "hardship" within the meaning of Chevron. If such were the case no rule could be applied retroactively. The impact of the decision must be unfair to litigants by virtue of their justified reliance on a prior law in order to stay the ordinary operation of retroactivity. The purpose of Trimble is to allow nonmarital children an equal opportunity to share in their father's estate; this can hardly be outweighed by Appellee's desire to profit from the inequitable treatment which has historically been visited on illegitimates.

Moreover, Marshall v. Marshall, 670 S.W.2d 213, (Tenn. 1984) held that

"prospective only" application of an overruling decision should be limited to a case in which the hardship on the relying party outweighs the hardship on the party otherwise entitled to the benefit of the new rule. Marshall concluded that:

Since there are few cases where such rigorous demonstrations can be made, there should be few occasions when prospective overruling can justifiably displace the normal retroactive application of the overruling decision.

Id. at 215.

No reliance-related hardship of Appellees is presented by this case, so that that side of the scales is empty. On Delynda's side are the constitutional and societal interests in justice, which this Court recognized as deserving of deference in Trimble, and Delynda's right to a fair share of her father's estate.

The exclusion of nonmarital children from the rights granted children generally falls more heavily on them than the

recognition of their rights would fall on others. Even if reliance on changed law were not required, the duty imposed by the Fourteenth Amendment in this case falls more lightly on Delynda's half-siblings than the unconstitutional statute's burden fell on Delynda. The principal asset of Prince Ricker's estate is income from oil and gas leases. Delynda's share of the income from these leases is estimated to be \$2,500 per month. Under the discriminatory statute, Delynda has been deprived of the entire amount, as it has been divided among the other five children. Each of the other children has received an additional \$500 per month above the \$2,500 which he or she would have otherwise received, less any attorney's fees in carrying forward the defense of Delynda's claims.

In conclusion, Equal Protection scrutiny should be applied in this case under Trimble: (1) because Trimble was not novel; (2) because this claim was brought in an open estate, so that Trimble's purpose would be defeated by a refusal to apply it in this case; and (3) because the balance of the equities strongly favors retroactivity in the absence of reliance by Appellees.

II.

TEXAS HEIRSHIP STATUTES VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BY INVIDIOUSLY DISCRIMINATING AGAINST SURVIVING MOTHERS ON THE BASIS OF THEIR SEX.

Gender discrimination is a distinct reason that the 1956 §42 violates Equal Protection. The issue is one of first impression, having been previously

reserved in Trimble v. Gordon, 430 U.S. 762, at 766.

Delynda has standing to urge the point because she has been harmed directly by the sex-based discrimination inherent in the 1956 enactment of §42 of the Texas Probate Code, and she has asserted invidious sex discrimination at every level of appeal in the state courts.

A. THE PROBATE STATUTES GIVE PREFERENCES TO FATHERS AND ACT TO THE HARM OF SURVIVING MOTHERS, ON THE BASIS OF THEIR SEX.

Parents have moral and legal duties to care for and support their children. Gomez v. Perez, 409 U.S. 535 (1973). When one parent dies, the Texas Probate Code gives preference and assistance in meeting these obligations to a surviving father but not to a surviving mother.

The statute provides that an illegitimate child may inherit from its mother

just as the legitimate child may, but that an illegitimate child may inherit from its father only if legitimated by a marriage. (Jurisdictional Statements Appendix B,2B.3)

A surviving father can expect to have the use of the child's share of the mother's estate in discharging his duties of care and support to the child. But if the surviving parent is female, the illegitimate child is barred from heirship and, unlike the surviving father, the mother is denied access to the estate in discharging her parental duties. This arbitrary denial significantly increases the burdens already borne by the surviving mother and is predicated solely on her sex.

B. THE PROBATE CODE'S GENDER-BASED CLASSIFICATIONS ARE NOT SUBSTANTIALLY RELATED TO AN IMPORTANT STATE INTEREST, ESPECIALLY IN LIGHT OF ADVANCES IN POST-MORTEM SCIENTIFIC EVIDENCE.

The Equal Protection test for gender-based classifications is set out in Caban v. Mohammed, 441 U.S. 380, 388 (1979):

Gender based distinctions must serve "important governmental objectives" and must be "substantially related to achievement of those objectives" in order to withstand judicial scrutiny under the Equal Protection Clause.

The importance of the state's objectives in probate--prevention of spurious claims and providing for orderly devolution of property--is not in dispute. The §42 discrimination against women, however, is not substantially related to achieving these objectives.

The relation between the §42 gender classification and these objectives lies

in the claim that paternity is more often difficult to prove than is maternity.

Difficulty in proving paternity, however, does not justify the wielding of a statutory meat axe which excludes all illegitimate children from paternal heirship.

The 1956 §42 is fatally flawed because it excludes heirship even where, as in the case at bar, proof problems do not exist and paternity has been favorably adjudicated.

Even where proof problems do exist, this Court has not allowed them to run roughshod over the Fourteenth Amendment right to Equal Protection. In Gomez v. Perez, 409 U.S. 535, this Court noted that proof of paternity problems cannot "be made into an impenetrable barrier that works to shield otherwise invidious

discrimination." Id. at 538. Since Gomez, strides in post-mortem blood testing have attenuated the relation between proof of paternity problems and governmental objectives in probate. See, e.g., Di Lonardo, "Genetic Identification of Disappeared Children," 5 The Am. J. of Forensic Med. and Pathology 339 (Dec. 1984). Mayr, "Paternity Testing With Unavailable Putative Father or Mother," in Inclusion Probabilities in Parentage Testing 373 (R.H. Walker ed. 1983).

In Trimble v. Gordon, 430 U.S. 762, proof problems were held to be insufficient justification for discrimination based on illegitimacy. The same problems cannot justify discrimination against certain classes of women--in this case, surviving mothers of illegitimates.

III.

DELYNDA IS ENTITLED TO FULL LEGITIMATION, HEIRSHIP, AND ATTORNEY'S FEES AS THE CONSTITUTIONAL EQUIVALENT OF THE REMEDIES AVAILABLE UNDER THE FAMILY CODE PATERNITY ACTION, FROM WHICH SHE WAS INVIDIOUSLY EXCLUDED.

A. THE FAMILY CODE CHAPTER 13
EFFECTIVE DATE IS UNCONSTITUTIONAL

The major state interest which could justify denying Delynda legitimation relief under Family Code Chapter 13 is difficulty in proof of paternity as related to orderly and efficient probate. This Court has recognized that such unequal treatment is not justified unless the law allows the illegitimate "a reasonable opportunity . . . to bring suit." Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Trimble v. Gordon, 430 U.S. 762, 774 (1977). Limitations on the rights of illegitimates to relief under Chapter 13 must be "substantially related to the state's interest in

avoiding litigation of stale or fraudulent claims." Mills, 99-100.

The effective date of Chapter 13 excludes all illegitimates born prior to September 1, 1975 from bringing suit under the statute and thus from the rights therein conferred. The denial of Chapter 13 relief to the class of illegitimates born prior to September 1, 1975 is unjustifiable under the "reasonable opportunity" and "substantial relation" tests as set out in Mills.

The rights and benefits conferred on some illegitimates by Chapter 13 are wholly denied to Delynda's class of illegitimates, who were born prior to its effective date. There is no statutory opportunity at all for that class of illegitimates to seek Chapter 13 relief. This

court has already recognized that proof of paternity problems cannot "be made into an impenetrable barrier that works to shield otherwise invidious discrimination."

Gomez v. Perez, 409 U.S. 535, 538. The effective date of Chapter 13, and the consequent unequal treatment of illegitimates born prior to it, fails the "reasonable opportunity" test of Mills.

Neither does the effective date bear a substantial relation to the state interest of avoiding stale or fraudulent claims. The 1983 amendment to §13.01 retroactively allows a Chapter 13 action up to the second anniversary of the child's majority, indicating a legislative belief that paternity actions for children up to that age are worthy of adjudication. The case at bar was initiated in Delynda's

19th year. In making the 20-year limitation period expressly retroactive, the Texas legislature has disclaimed any state interest in preventing paternity claims such as Delynda's. Thus the unamended 1975 effective date of Chapter 13 stands to arbitrarily exclude claims which the legislature itself has deemed worthy of adjudication.

There is no reason to assume that a paternity claim of an illegitimate born in 1974 poses any more difficulty for adjudication than would the claim of an illegitimate born in 1976. The meat axe exclusion of the paternity actions of illegitimate children born prior to September 1, 1975, is wholly arbitrary. The statute's bar to Delynda's cogent proof of paternity, based solely on her

date of birth, bears no substantial relation to any permissible state interest.

For these reasons, the effective date exclusion violates the Equal Protection rights of illegitimates in Delynda's class.

B. THE REMEDY FOR THE UNCONSTITUTIONAL EFFECTIVE DATE IS A CONSTITUTIONALLY BASED GRANT OF RIGHTS EQUIVALENT TO THOSE AFFORDED IN CHAPTER 13, OR STRIKING THE UNCONSTITUTIONAL EFFECTIVE DATE.

In Wynn v. Wynn, 587 S.W.2d 790, (Tex. Civ. App.--Corpus Christi, 1979, no writ), a putative father attempted to avoid a claim for child support based on the effective date of Chapter 13, and the child's earlier birth. The court noted that this attempt

virtually ignores the United States Supreme Court decision of Gomez v. Perez, 409 U.S. 535... and every other involuntary paternity suit brought for the purpose of establishing the paternity of a child born prior to

September 1, 1975, in Texas after that decision.

Id. at 793.

Noting that the statutory procedure of Chapter 13 is "but a convenient method" to establish paternity, the specific provisions of which "apply only to children who were born on or after the effective date," Id. at 793, the court went on to affirm the trial court's finding of paternity. It held the child was entitled to support equivalent to that which is granted under Chapter 13, but that the action was a judicially fashioned remedy under the constitution "governed by common law principles since there are no express statutory provisions governing the situation." Wynn, 587 S.W.2d at 794.

An analogous remedy for the unconstitutional effective date in this case is the grant of rights equivalent to those denied by the Family Code, as was done with support rights under Gomez in Wynn. An alternate remedy would be to strike the effective date provision itself, allowing Chapter 13 rights to illegitimates born prior to September 1, 1975. Either remedy achieves the mandate of the Equal Protection Clause of the Fourteenth Amendment under the reasoning of Mills, which struck down the same statute's invidious one-year statute of limitations. The benefits of Chapter 13 cannot be denied by a classification which provides certain illegitimates no reasonable opportunity to attain its benefits, without a

substantial relation to relevant state interests.

C. DELYNDA'S CHAPTER 13 CLAIM IS APPROPRIATELY BROUGHT IN PROBATE.

As a matter of statutory construction, death of the father does not abate a Chapter 13 action. Were such the intention of the legislature, language to that effect would be found in the statute. In fact, the language of the statute contemplates proceeding in the absence of the father. In §13.02 the legislature predicates the order to submit to blood tests on the appearance of the father: "When the respondent appears in a paternity suit, the court shall [order tests]" The implication is that no such order need be made in the absence of the father's appearance.

Further, since 1983, the only time limit placed on a child's ability to bring suit is that she do so prior to the second anniversary of her majority. §13.01. This express limit negates an inconsistent implied limit on the action to the lifetime of the father.

Moreover, Texas courts have proceeded with paternity cases in the father's absence. Williams v. Texas Department of Human Resources, 619 S.W.2d 450 (Tex.App.-- Waco 1981, no writ).

1. JUDICIAL CONSTRUCTION
REQUIRING THAT THIS ACTION BE MAINTAINED DURING HER FATHER'S LIFETIME WOULD DENY A REASONABLE OPPORTUNITY FOR DELYNDA'S CLAIM.

Under Mills, Chapter 13 must pass two tests. It must allow Delynda a reasonable opportunity to bring suit, and any state action truncating this opportunity must

bear a substantial relationship to a permissible interest. The court in Handley v. Schweiker, 697 F.2d 999, 1005, found that Mills compelled the conclusion that "the state interest in orderly estate settlement is insufficient to uphold the requirement that the paternity proceedings be maintained during the father's lifetime."

This holding applies in the case at bar. Delynda's opportunity to bring a Chapter 13 action during her father's lifetime was so beset with practical difficulties as to render it illusory, and virtually non-existent. Mills v. Habluetzel 456 U.S. 91, 97.

Delynda was adopted as a small child. Like many adopted children, she had no idea that she was illegitimate, nor had

she any reason to know. Thus, there was no way for her to be aware of any right, or need, to bring a lifetime action. But had Delynda known of the need, she still would have been afforded no reasonable opportunity for her paternity suit either by statute or by a Wynn action.

Delynda could not take advantage of the Chapter 13 action because of its effective date and because of the one- and four-year limitations periods. These provisions were formidable practical obstacles to her relief under Chapter 13.

Appellee suggests that during her father's lifetime Delynda could have sought Chapter 13 relief under a Wynn theory of constitutional equivalency. It would be unreasonable in the extreme to expect Delynda to have seen beyond the

prohibitive effective date of the 1975 statute to a constitutional claim of Equal Protection. If she had done so, however, practical considerations would have limited the possibility of even that action.

The Wynn action was predicated on the support right recognized in Gomez. But Delynda was adopted by Jerry Barker before the opinion in Gomez was handed down. Since, in Texas, adoption nullifies support obligations of the natural father, Gomez furnished no basis upon which to make a Wynn claim. The added benefit of Chapter 13 legitimation could not alone have caused Delynda to seek constitutional redress--as she was unaware that she was illegitimate.

For Delynda to have been aware of her status of birth, and of her constitutional right to the equivalent of Chapter 13 benefits, she would had to have been a constitutional scholar and a private detective, not an adopted fourteen-year-old child. She did not have a reasonable chance, as a child, to bring such an action.

Moreover, it is significant that Prince Ricker died on December 22, 1976--less than one year and three months after the effective date of Chapter 13, and less than the two-year period struck down in Pickett v. Brown for bringing a legitimation action. Delynda had recently turned 16 when her father died.

Given Delynda's belief that she was legitimate, the state of the law in 1976,

and the proximity of the enactment date of Chapter 13 to her father's death, it can hardly be claimed that Delynda had a reasonable time to petition for rights equivalent to those found in Chapter 13. For these reasons, if Delynda is denied a post-mortem paternity suit, she will have had no reasonable opportunity to exercise her Chapter 13 rights.

2. THERE IS NO SUBSTANTIAL
RELATIONSHIP BETWEEN A LIFETIME
REQUIREMENT AND A PERMISSIBLE STATE
INTEREST.

The second test in Mills queries whether denying Delynda a post-mortem paternity suit bears a substantial relationship to a permissible state interest.

While it may be the case that some post-mortem paternity actions present substantial proof problems, a categorical

exclusion of such actions is unconstitutional because it denies certain illegitimizes the opportunity to pursue legitimation actions which are not only meritorious, but capable of being proven by clear and convincing evidence.

Delynda's action falls into this class.

Handley v. Schweiker is a strikingly similar case to the one at bar, and the reasoning of the court applies here.

That biological evidence, or the father's presence, is not essential to determine paternity is poignantly illustrated by this case. It comes to us after a judicial determination that the alleged father was, in fact, the real father, had been made by the administrative law judge and sustained by the federal district court judge,

697 F.2d 999, 1005-6 (1983).

A statutory construction which completely excludes post-mortem suits must fail constitutionally because it necessarily and arbitrarily excludes meritorious and provable claims, such as Delynda's.

Not only, then, is Chapter 13 construed on its own terms as allowing post-mortem paternity suits, but such construction is required under both the "reasonable opportunity" and "substantial relationship" Mills analyses. Delynda's suit is therefore appropriately decided in probate.

D. DELYNDAS HAS SATISFIED THE SOLE REQUIREMENT FOR A PATERNITY DECREE UNDER CHAPTER 13.

While due process requires notice of a claim to paternity, Prince Ricker had fair notice of Delynda's claim of his

paternity through her adoption proceedings. And notice has been given his estate in the present action.

Since the sole determination in a Chapter 13 action is whether or not the child is the daughter of the putative father, this action in probate has satisfied the sole requirement for a decree under a Chapter 13 paternity action. In Trimble v. Gordon it was determined that adjudication of a support case "should be equally sufficient to establish. . .[a] right to claim a. . . share of. . .[the] estate." 430 U.S. at 772.

A requirement to relitigate paternity under another caption or another statute was recognized as unreasonable in Handley, 697 F.2d, at 1006:

To require yet a third determination of the matter because resolution of the issue was subsumed in a trial which did not bear the title "paternity proceeding" would be to squander judicial efforts and to redundantly spiral appellant through a technical loophole.

E. DELYNDA IS DENIED EQUAL PROTECTION BY THE ARBITRARY EFFECTIVE DATE OF CHAPTER 13 AND IS ENTITLED TO RELIEF EQUIVALENT TO THAT GRANTED BY THE STATUTE: HEIRSHIP, LEGITIMATION, AND ATTORNEY'S FEES.

The statutory classification denying Delynda relief under Chapter 13 inviscerally discriminates against the class of illegitimates born prior to September 1, 1975. Delynda is therefore entitled to Equal Protection relief equivalent to the full measure of statutory relief available

under Chapter 13. Besides heirship under the 1979 probate amendment, Chapter 13 accords Delynda legitimate legal status, and attorneys' fees reasonably necessary to vindicate them.

The grant of legitimation under Chapter 13 is not discretionary. It is a matter of right upon a jury finding of actual paternity, which Delynda secured in the trial of this cause. The grant of attorney's fees under Chapter 13 §13.42(b) is discretionary. But the equities in this case favor the award of attorney's fees, because the entire course of this eight-year litigation has been an attempt by Appellee to deprive Delynda of her rights of heirship under a statute which Appellee admitted at the outset to be utterly unconstitutional. Delynda's

fees incurred in defense of her rights have been both reasonable and entirely necessary, and she requests this Court grant them in addition to legitimation and heirship, under Chapter 13.

IV.

DELYNDA IS ENTITLED TO LEGITIMATION AND HEIRSHIP FROM HER FATHER BECAUSE HER EXCLUSION FROM THE BENEFITS OF VOLUNTARY LEGITIMATION UNDER THE FAMILY CODE WAS INVIDIOUS.

In Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982) the court considered the constitutionality of a state denial of heirship. It found that the illegitimate child was entitled to survivor's benefits because the state law violated equal protection under Trimble v. Gordon 430 U.S. at 771-72 and Lalli v. Lalli, 439 U.S. at 271, 275-76. The Cox plaintiff was the minor son of James Appling, deceased. Georgia law at that time denied all heirship to illegitimate children, but

provided for legitimation by marriage of the parents or by voluntary petition by the father. Mr. Appling did not marry the mother of his son nor petition to make him legitimate. The Fifth Circuit held that this opportunity for legitimation had been too restrictive, and that the child would have a right to inherit under the Fourteenth Amendment. It therefore held him entitled to survivors benefits.

Cox is in line with decisions of this Court which have made it clear that a statutory opportunity for the child to legitimate himself must provide him a "reasonable opportunity" to bring an action. Mills v. Habluetzel 456 U.S. 91 (1982).

The state of the law in Texas after the enactment of the voluntary legitima-

tion statute in response to Gomez mirrors exactly the law struck down in Cox. The purely voluntary legitimation action was not a "sufficient opportunity" for Delynda to legitimate herself, nor was it reasonably related to the relevant state interests, when she actually proved paternity by convincing evidence at trial. Delynda's exclusion from legitimate status and according heirship was thus invidious, and she must be granted equivalent legitimation under the Fourteenth Amendment.

V.

THE CLASSIFICATIONS EXCLUDING DELYNDIA FROM HEIRSHIP UNDER THE 1977 AND 1979 AMENDMENTS TO §42 OF THE PROBATE CODE WERE INVIDIOUS AND INVALID.

The 1956 Probate Code §42 was twice amended before trial. The legislature made the amendments effective May 28, 1977, and August 27, 1979, rather than

making them retroactively available to estates which had not yet closed. In treating Delynda's heirship as though the amendments had never been enacted, the lower court was thus correct under state statutes.

By denying retroactive application of the amendments to estates of men who had died earlier, but which were still open and pending at the amendments' effective dates, the legislature unconstitutionally discriminated against nonmarital children making claims in those estates. Upon denying Delynda's foregoing claims for Equal Protection relief, the lower court should have looked past the amendments' unconstitutional effective dates. Viewing the amendments as being in force when Delynda's father died, it should have then

determined whether Delynda was entitled to any relief under their substantive provisions. In so viewing them, it is clear that Delynda is entitled to the benefit of the heirship granted by the amendments, since the classifications excluding her from the Family Code legitimation procedures referenced by the amendments was invidious and void.

The 1977 amendment granted heirship only to persons whose fathers had, on a purely voluntary basis, legitimated them by executing a sworn acknowledgment of paternity under the Family Code. Other proof of paternity, including even an adjudication of paternity with the father as a party, was irrelevant to the 1977 amendment. There was no constitutionally sufficient reason for this refusal to con-

sider any alternative evidence of paternity. The exclusion denied any reasonable opportunity to the benefits of legitimation under the voluntary Family Code procedure. At trial, Delynda proved paternity in this case by convincing evidence which was disregarded under the statute. Delynda's adoption meant that her natural father would have been even less likely to legitimate her than in the case of the father of an unadopted child. And through the adoption, Delynda's father was formally advised, during his own lifetime, of the claim that Delynda was his. Looking past the unconstitutional requirement of legitimation by a voluntary sworn acknowledgment, Delynda was therefore entitled to legitimation equivalent to that granted by the voluntary procedure and to the relief granted or incorporated by reference in the 1977 amendment.

The 1979 amendment granted heirship to persons who were "legitimated by a court decree as provided by Chapter 13 of the Family Code." Since the 1979 amendment incorporated the provisions of Chapter 13 of the Family Code, its constitutionality must be determined by reference to those provisions.

The legislature provided an effective date of September 1, 1975, for Chapter 13 of the Family Code. Born prior to Chapter 13's effective date, Delynda was unable to be legitimated through Chapter 13 procedures. The 1979 amendment to the Probate Code thus unconstitutionally discriminated against illegitimates born prior to September 1, 1975, by providing no alternative to the Chapter 13 legitimation action as a means of sharing in their fathers' estates. Delynda proved her relationship to her father by clear and

convincing evidence, such as the invalid marriage of her parents and the decision of her father, upon receiving the papers, to allow her adoption. This proof was irrelevant under the 1979 amendment, which therefore provided Delynda no reasonable opportunity to bring suit and was unrelated to the need for cogent proof in probate. Delynda is therefore entitled to relief equivalent to that granted by or incorporated by reference in, the 1979 amendment, including the legitimation, heirship, and attorney's fees provided by Chapter 13.

REQUEST FOR RELIEF

Wherefore, Delynda requests this Court to reverse the judgment of the Texas Court of Appeals, and enter an order rendering judgment for Delynda as requested herein; or in the alternative, to issue its Mandate that the trial court enter an order:

1. Granting Delynda's Application for Heirship in her father's estate under the Fourteenth Amendment;

2. Awarding her an amount equal to the distributions of her father's estate which have already been made to her father's other heirs, as well as an equal share of all future distributions, pursuant to §§40 and 38, Texas Probate Code;

3. Declaring that Delynda is the legitimate child of her natural father, Prince Rupert Ricker, pursuant to Texas Declaratory Judgment Act, V.T.C.A., Civil Practice and Remedies Code §§37.005 and 37.003;

4. Awarding her prejudgment interest on her share of past distributions, which has been delayed during the eight-year course of this litigation; and postjudgment interest during any further delay after this Court's judgment, as provided by Cavner v. Quality Control Parking, Inc., 697 S.W.2d 549 (Tex. 1985);

5. Awarding her the reasonable and necessary attorney's fees incurred in securing the declaration of her rights herein, as provided by the Texas Declaratory Judgment Act, V.T.C.A., Civil Practice and Remedies Code §§37.005 and

37.009; and by the Fourteenth Amendment as the equivalent of the fees provided by Family Code §13.42(b); and

6. Taxing the costs in this matter to Appellee.

Appellant prays for such other and further relief, both in law and at equity, to which she may be entitled.

Respectfully submitted,

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